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Supreme
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FIRST AFFILIATED SECURITIES, INC.,
a California corporation, et al.,
Petitioners,

vs.

MARY LOU SULLIVAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can a defendant's right under *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), to remove a state court action arising from the same operative facts as a contemporaneously filed federal action be defeated unless there exists a ripe federal res judicata defense?

LIST OF PARTIES AND RULE 28.1 STATEMENT

Each party to the appeal to the Ninth Circuit Court of Appeals is a petitioner or respondent in this proceeding.

Respondents (plaintiffs and appellants below) are: Mary Lou Sullivan, Daniel T. Sullivan, William T. Sullivan, Jr., Kenneth C. Martin, Perry Kenny, Calvin F. Robinson, Catherine D. Robinson, Sydney Krogstad, Beverly Krogstad, Joseph S. Wand, Robert S. Mesires, William E. Coyle, Diane H. Coyle, Dan Boyd, Roxana Boyd, Thomas D. Adamson, Mark Adamson, Thomas C. Miller, Brian J. Miller, Robert E. Richardson, Raymond D. Sussman, Anjali Sussman, and Cerena Wong, all individuals; Malm Metal Products, Inc., a California corporation, Malm Metal Products, Inc. Defined Benefit Plan, Pine Creek Development Corporation Pension Plan and Trust, Pine Creek Properties, a California limited partnership, Robert E. Richardson, M.D., P.C., Defined Benefit Pension Plan and Trust, Joseph S. Wand, M.D., Inc. Pension and Profit Sharing Plan, and Able Fence Co., Inc., a California corporation.

Petitioners (defendants and appellees below) are: First Affiliated Securities, Inc., a California corporation, Larry Gibson, Harold E. Card, Raymond Jallow, Ira W. Palmer, William H. Palmer, and Tim D. Compton, Thomas Tierney, Tierney & Ernst, Carl E. Wright, Wright Herfordt & Sanders, Peat Marwick Main & Co. (formerly Peat, Marwick, Mitchell & Co.), Paul J. Keil and Financial Communications Group.

First Affiliated Securities, Inc. is a wholly owned subsidiary of Bekhor International Group, Inc. (U.S.A.) which, in turn, is a wholly owned subsidiary of A.G. Bekhor, Ltd. (England).

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No. _____

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FIRST AFFILIATED SECURITIES, INC.,
a California corporation, et al.,
Petitioners,

vs.

MARY LOU SULLIVAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 1, 1987, which held that removal, under the artful pleading doctrine, of a state court action arising from the identical facts as a contemporaneously filed federal action depends on the existence of a ripe res judicata defense.

OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 813 F.2d 1368 and is reproduced in Appendix I. The decision of the District Court is unreported. It is reproduced in Appendix II.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1987. A timely petition for rehearing and suggestion for rehearing en banc was denied on June 10, 1987. A timely motion to stay the mandate to permit the filing of this petition was granted. This petition is filed within 90 days of the denial of rehearing, and within the time required by the order staying the mandate. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The principal statutes involved are 28 U.S.C. §§ 1331 and 1441(a) and (b).

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

This case questions whether plaintiffs may affirmatively invoke federal jurisdiction by filing an action asserting federal claims in federal court, and at the same time defeat the defendants' statutory right pursuant to 28 U.S.C. §§ 1441(a) and (b) to remove to federal court plaintiffs' contemporaneously filed state action arising out of the same nucleus of operative facts but artfully drawn to rely only on state law.

Petitioners ("defendants") timely removed this action, which respondents ("plaintiffs") filed in California state court, to the United States District Court for the Northern District of California. Plaintiffs had filed a parallel federal action there against the same defendants, based on the identical facts.[1] Defendants moved to transfer both the federal action and this action to the United States District Court for the Western District of Missouri.[2] A number of actions were pending in that district involving the same defendants and arising from the same facts, including a class action as to which plaintiffs were then putative class members.[3] At the same time, plaintiffs moved to remand this action to state court on the ground that no federal question was presented.[4]

The District Court denied plaintiffs' motion to remand and transferred both plaintiffs' actions to Missouri.[5] It found that, in filing their federal claims, plaintiffs had "evidenced their intention to utilize affirmatively the processes of the federal courts to redress the identical claimed injury alleged" in this action, and that plaintiffs' "contemporaneous filing of their Federal Action precludes them from defeating removal by the 'artful pleading' of the same operative facts as state law claims."[6] The District Court's ruling was based upon the branch of the artful

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[1] *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1370-71 (9th Cir. 1987), Appendix I at A-4, A-6; Order Denying Plaintiffs' Motion to Remand and Granting Defendants' Motions to Transfer Venue of Related Actions ("Order Denying Remand"), Appendix II at A-20.

[2] 813 F.2d at 1370-71, Appendix I at A-6.

[3] *Id.* at 1370 and n.2, Appendix I at A-5.

[4] *Id.* at 1371, Appendix I at A-6.

[5] Order Denying Remand, Appendix II at A-22.

[6] *Id.* at A-20, A-21.

pleading doctrine applied in this Court's decision in *Federated Department Stores v. Moitie,* 452 U.S. 394 (1981), and in the decision in *Salveson v. Western States Bankcard Ass'n,* 525 F. Supp. 566 (N.D. Cal 1981), *aff'd in relevant part,* 731 F.2d 1423 (9th Cir. 1984).[7]

The District Court thereafter denied plaintiffs' motion for reconsideration. However, it certified its order denying the motion to remand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed transfer of this action to permit plaintiffs to petition for leave to appeal.[8] The Court of Appeals granted leave to appeal and subsequently reversed. It held that removal under the *Moitie* branch of the artful pleading doctrine can only be based on a res judicata defense.[9] No res judicata defense has ripened in this action, since judgment has not yet been entered in plaintiffs' federal action.

REASONS FOR GRANTING THE WRIT

The non-preemption branch of the artful pleading doctrine that the Court addressed in *Moitie* is an area of law in need of this Court's authoritative voice. The doctrine involves an important issue of federal law — interpretation of an Act of Congress defining the jurisdiction of the federal courts. There is sharp disagreement between the opinion in this case and existing decisions of this Court and of the Fifth and Second Circuits. This case squarely frames the issue, and a decision by this Court will give guidance to the lower courts in this fundamental area of federal law.

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[7] *Id.* at A-20, A-21.

[8] 813 F.2d at 1371, Appendix I at A-6.

[9] 813 F.2d at 1376, Appendix I at A-15—A-17.

I.

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUIT COURTS.

A. The Court of Appeals' Decision Conflicts With This Court's Decision In *Federated Department Stores v. Moitie.*

The decision of the Court of Appeals conflicts with this Court's decision in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981).[10] In *Moitie*, this Court applied the "artful pleading" doctrine to uphold removal of a state court action based on a parallel federal action arising from the same nucleus of operative facts. In that case, after plaintiffs lost a federal antitrust action, two of the plaintiffs did not appeal. Instead, they filed a state court action based on identical facts but purporting to raise only state law claims. Defendants removed the action on the basis of federal question jurisdiction. The district court refused to remand and dismissed the action on the ground that the prior federal action was res judicata. The Court of Appeals affirmed the denial of remand but reversed the dismissal, creating a public policy exception to the doctrine of res judicata.

On writ of certiorari, this Court upheld removal but reversed the Court of Appeals' decision on res judicata. As to removal, the Court stated:

> As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." . . . The District Court applied that settled principle to the facts of this case. . . . [I]t found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims. We will not question here that factual finding.[11]

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[10] As discussed in Part II below, the decision also conflicts with decisions of this Court and the other lower federal courts espousing the rule that removal may not be based on a federal defense.

[11] 452 U.S. at 397 n.2.

The Court of Appeals in the instant action examined two possible rationales for removal on the basis of the *Moitie* branch of the artful pleading doctrine. The "election" rationale depends on a plaintiff's decision to assert federal claims and invoke federal jurisdiction over those claims. Where plaintiffs have elected to utilize the processes of the federal courts to vindicate their rights, defendants may remove a parallel state action involving substantially similar claims by the same plaintiffs against the same defendants. The "res judicata" rationale permits removal only on the basis of a res judicata defense to the parallel state action arising from a prior federal judgment. In its decision in this case, the Court of Appeals expressly rejected the "election" rationale and adopted the "res judicata" rationale.[12]

The Court of Appeals' opinion stated, as to this Court's decision in *Moitie:* " The Supreme Court dedicated most of its opinion to res judicata, giving cursory treatment to removal. *Moitie* can thus be construed as permitting removal only of state claims filed to circumvent the res judicata impact of a federal judgment."[13] This construction of *Moitie* is misconceived.

This Court *did* devote most of its decision to res judicata — the primary issue before the Court. But the Court gave no indication of a link between its decision on res judicata and its decision on the artful pleading doctrine upholding removal. Its res judicata analysis dealt only with whether the Court of Appeals erred in creating a public policy exception to the res judicata doctrine; it did not discuss removal.

In connection with removal, on the other hand, *the Court never so much as mentioned res judicata.* Instead, it found that "at least some of the claims had a sufficient federal character to support removal."[14]

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[12] 813 F.2d at 1373, Appendix I at A-11. The Court of Appeals rejected the "election" rationale, even though it recognized that adoption of that rationale would serve a number of purposes. "Requiring plaintiffs to submit to this election would avoid splitting of claims arising from the same facts, simplify mass litigation, save judicial resources, and balance the plaintiffs' choice of forum against the defendants' interest in avoiding multiple litigation." *Id.* at 1374, Appendix I at A-12.

[13] *Id.* at 1376, Appendix I at A-15.

[14] 452 U.S. at 397 n.2.

The Court never implied that removal was proper *because* of the existence of a res judicata defense, as the Court of Appeals held here. Justice Brennan's dissent, arguing that removal was not proper because the removed case articulated only state-law claims[15], clearly invited such a response if that was what the majority intended. The majority opinion, however, nowhere stated that the existence of a res judicata defense provides the requisite federal character to support removal.

B. The Court of Appeals' Decision Conflicts With Decisions Of The Second and Fifth Circuits.

A further reason for granting the writ is that the Court of Appeals' opinion directly conflicts with existing decisions of other federal circuit courts on an important question of federal law, going to the heart of federal jurisdiction. Two other circuits applying the *Moitie* branch of the artful pleading doctrine have construed it as embodying the election rationale that the Ninth Circuit rejected, not the res judicata doctrine that the Ninth Circuit adopted.

Rule 17 of the Supreme Court Rules provides that one consideration governing review on certiorari is: "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ." Because the Court of Appeals' decision conflicts with decisions of the Second and Fifth Circuits, the writ should be granted.

1. ***Travelers Indemnity Co. v. Sarkisian***

In *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, 107 S.Ct. 277 (1986), the Second Circuit expressly rejected federal res judicata as a basis for removal under the *Moitie* branch of the artful pleading doctrine and instead applied the "election" rationale.[16] The *Travelers* court

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[15] *Id.* at 409-10.

[16] In *Travelers*, plaintiff filed in federal court an action under the Racketeer Influenced & Corrupt Organizations Act ("RICO"), which action was dismissed on the authority of a case later reversed by the Supreme Court. The court of appeals affirmed the dismissal prior to the change in the law. Plaintiff did not petition for writ of *certiorari*. Plaintiff had also commenced an action in state court alleging state court theories of fraudulent conveyance, piercing the corporate veil and unlawful payment of dividends and salary. Defendants removed on the theory that the state court claims were "artfully pled" RICO claims.

thoughtfully analyzed and rejected the "res judicata" rationale the Court of Appeal adopted here:

> *Salveson* also suggested, as an additional rationale for removal in *Federated Stores,* that "the effect of permitting Brown to prosecute the same claims under state law in the second action would have been to impair the ability of defendants to assert the federal *res judicata* defense against those claims." *Salveson v. Western States Bankcard Association,* [525 F.Supp. 566, 575 (N.D. Cal. 1981)]. However, if Brown's case had been remanded to state court, the *res judicata* effect of the prior federal question suit would still have been governed by federal law.
>
> * * *
>
> [T]o hold that a plaintiff's state law claim will be recharacterized as a federal claim whenever it arises out of the same transaction as a prior federal claim would lead to the anomalous result that a case is removable under *Federated Stores* only if the defendant has a successful *res judicata* defense under federal law. This approach would seem to violate the well-established rule that removal jurisdiction may not rest on a federal defense.[17]

The Second Circuit Court of Appeals derived two requirements for finding that a federal claim is removeable under *Moitie* as "artfully pled": (1) the elements of the claim must be substantially identical to those of a claim expressly grounded on federal law; and (2) plaintiff must have "previously elected to proceed in federal court."[18] The *Travelers* court ultimately found that removal in that case was improper because the elements of the state law claims were not substantially identical to the previously pled RICO claims.[19]

The Court of Appeals in this case flatly rejected the *Travelers* decision:

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[17] 794 F.2d at 761 n.8. and n.10

[18] *Id.* at 760.

[19] Petitioners here meet both requirements set by the *Travelers* court. The state and federal securities laws claims asserted by plaintiffs in their parallel actions are substantially identical. And, prior to removal, plaintiff elected to proceed in federal court.

> [A]ttempts to place limits on the scope of the election rationale have been unsatisfactory. The Second Circuit allows removal based on a plaintiff's election only if he filed substantially similar state and federal claims, and filed the federal claim in federal court first. *Travelers*, 794 F.2d at 760-61. . . . The requirement of substantial similarity of claims seems unsound. . . . Also, the order of filing should make no difference. Regardless of the filing order, the plaintiff will have elected to use the federal forum and to split his claims.[20]

2. *Powers* v. *South Central United Food & Commercial Workers Unions.*

The Second Circuit is not the only other federal circuit with which the opinion in this case is in conflict.[21] The Court of Appeals' decision is also inconsistent in reasoning and principle with that of the Fifth Circuit Court of Appeals in *Powers v. South Central United Food & Commercial Workers Unions,* 719

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[20] 813 F.2d at 1375, Appendix I at A-14.

[21] The unsettled nature of the law in this area is not only exemplified by the split among the federal circuit courts, but by the split within the Ninth Circuit itself. The Court of Appeals' decision is in conflict with two earlier Ninth Circuit decisions, *Moitie v. Federated Department Stores*, 611 F.2d 1267 (9th Cir. 1980) and *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), *aff'g in relevant part*, 525 F.Supp. 566 (N.D. Cal. 1981). In *Moitie*, the Ninth Circuit squarely held that the action had been properly removed under the artful pleading doctrine while at the same time holding that res judicata did *not* apply to bar plaintiffs' claims. Therefore, federal res judicata could not possibly have been any part of the court's rationale for applying the artful pleading doctrine in that decision. On writ of certiorari, this Court did not disturb that part of the Court of Appeals' ruling, although it reversed the res judicata holding.

In *Salveson v. Western States Bankcard Ass'n*, the Court of Appeals held that the federal nature of plaintiff's claim may derive from the plaintiff's election to pursue in federal court claims based upon the same nucleus of operative facts as his state court claims — the "election" rationale:

> Critical in *both* res judicata and artful pleading considerations was the fact that appellant Brown had previously filed the claims as federal claims in federal court. . . .
>
> We agree that the conclusion of artful pleading is properly drawn when the plaintiff "by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one."

Id. at 1429 (footnote and citation omitted; emphasis added). Thus *Salveson* expressly adopted, not the federal "res judicata" rationale, but the very "election" rationale which the Court of Appeals rejected in this decision.

F.2d 760 (5th Cir. 1983).[22] The Fifth Circuit, like the Second Circuit, applied the "election" rationale in determining whether the state action artfully pled federal claims.[23] The Court of Appeals in this case expressly acknowledged its disagreement with *Powers:*

> The Fifth Circuit [in *Powers*] held that removal was improper because, in contrast to *Moitie,* the plaintiff had "not evidenced a desire to proceed under federal law; rather, she has consistently and vociferously attempted to avail herself of the state forum," *id.* at 766, and she filed the federal suit after the state suit as a tactical maneuver to protect against the running of the statute of limitations, *id.* at 766 n. 5. The Fifth Circuit's distinctions are not persuasive. The amount of effort plaintiff expended in the state forum, and her motives for filing the federal action, whether tactical or not, are irrelevant if removal is justified by the election to pursue the federal action.[24]

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[22] Not only did the Court of Appeals flatly reject the decisions of the Second Circuit and the Fifth Circuit, it also rejected, *sub silentio,* the District Court decision in *Reid v. Walsh,* 620 F. Supp. 930 (M.D. La. 1985), a case squarely on point with this one.

[23] *Id.* at 766 and n.5. The plaintiff in *Powers* initially filed a state action seeking relief exclusively under state law. Defendants removed the action based on the branch of the artful pleading doctrine involving federal preemption of state law remedies. *After* removal, plaintiff filed a parallel federal action. Her purpose in filing the federal action was to protect against the expiration of the statute of limitations on the federal claims defendants contended were plaintiff's sole remedy and which plaintiff wished to assert in the event the court determined she had no state remedy and denied remand. In ordering the remand in *Powers,* the Court of Appeals stressed that plaintiff's invocation of federal jurisdiction after removal was purely defensive.

[24] 813 F.2d at 1375, Appendix I at A-14, A-15. Since the *Powers* plaintiff *never* elected to proceed in federal court prior to the removal of her state action, that later-filed action could never support removal. The crucial time in determining the propriety of removal is the time of removal. *Pullman Co. v. Jenkins,* 305 U.S. 534, 537-38 (1939); *In re Carter,* 618 F.2d 1093 (5th Cir. 1980), *cert. denied* 450 U.S. 949 (1981); *Westmoreland Hosp. Ass'n v. Blue Cross,* 605 F.2d 119, 123 (3d Cir. 1979), *cert. denied,* 444 U.S. 1077 (1980).

II.

THE COURT OF APPEALS' DECISION MAKING REMOVABILITY DEPEND ON A FEDERAL DEFENSE IS A CLEARLY ERRONEOUS APPLICATION OF THE REMOVAL STATUTE.

The decision of the Court of Appeals not only conflicts with decisions of this Court and of the lower federal courts, but it erroneously makes removal of an action under the artful pleading doctrine applied in *Moitie* depend exclusively on the existence of a federal defense. It thereby both conflicts with numerous decisions of this Court and makes *Moitie* removal purposeless.

A. The Decision Improperly Grounds Removal Upon A Federal Defense

The Court of Appeals' ruling that the right to remove a state court action that parallels a federal action depends on the existence of a ripe res judicata defense, creates a unique and inappropriate exception to perhaps the most firmly established rule of removal law. As this Court recently reiterated:

> [I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.[25]

The Court of Appeals' decision in this case, holding that removal would be proper only if there existed a federal res judicata defense to plaintiffs' state action, is absolutely irreconcilable with that principle.

The Court of Appeals acknowledged that its holding created an exception to the principle that a federal defense cannot support removal. It attempted to rationalize this radical departure from existing law by arguing that the preemption

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[25] *Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4805 (June 9, 1987) (emphasis in original). *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-12 and n.9 (1983).

branch of the artful pleading doctrine is also, in effect, removal based on the existence of a federal defense. This is wrong. In cases removable on that rationale, *plaintiff* is necessarily relying upon federal law, because "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[26] Thus, even though defendant, too, may rely on federal law—a defense based on federal law preemption—removal is *not* based on that ground but rather on the ground that plaintiff's claim is necessarily a federal one.

> Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area, that *any civil complaint raising this select group of claims is necessarily federal in character.*[27]

B. The Decision Renders *Moitie* Removal Purposeless

Moreover, in holding that res judicata by reason of a prior federal adjudication constitutes the sole basis for removal under the artful pleading doctrine of *Moitie,* the Ninth Circuit has stripped the doctrine of all purpose. State courts must honor and apply res judicata arising from a federal judgment.[28] There is no need for removal to enforce such a judgment.

Even were a state court to refuse to honor the res judicata effect of a federal judgment, there is no point to removal in light of the injunction remedy available when federal res judicata provides a defense to a state action. A district court has the power to enjoin state court proceedings based upon a prior federal adjudication. Title 28 U.S.C. section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by

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[26] *Caterpillar Inc. v. Williams,* 55 U.S.L.W. at 4806. *See Metropolitan Life Ins. Co. v. Taylor,* 55 U.S.L.W. 4468, 4469 (April 6, 1987).

[27] *Id.* at 4469 (emphasis added).

[28] *See Federated Dep't. Stores v. Moitie,* 452 U.S. at 398; *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948).

Act of Congress, or where necessary in aid of its jurisdiction, . . . *or to protect or effectuate its judgments.*" (Emphasis added.) The "relitigation" exception to the Anti-Injunction Act

> allows federal courts to enjoin state court proceedings to protect the res judicata effect of their judgments. *Midkiff v. Tom,* 725 F.2d 502, 504 (9th Cir. 1984). "Such an injunction is appropriate where a federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Id.*[29]

Because federal courts can enjoin state court proceedings to give effect to federal res judicata, interpreting *Moitie* and *Salveson* as the Court of Appeals has done renders those cases meaningless.[30]

The Court of Appeals' decision is a clearly erroneous application of the removal statute. If permitted to stand, the decision will support, as a general proposition, the consideration by other federal courts of federal defenses in a removal analysis. At the same time, the decision has vitiated the nonpreemption branch of the "artful pleading" doctrine, by permitting removal only when an injunction of the state court action would otherwise be permitted.[31] The petition should be granted to correct the Court of Appeals' clear error in interpreting removal law.

III.

CONCLUSION

The decision of the Court of Appeals is a plainly erroneous application of the relevant provisions of the removal statute; it involves an important issue of federal law; it is in direct conflict

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[29] *Golden v. Pacific Maritime Ass'n,* 786 F.2d 1425, 1427 (9th Cir. 1986).

[30] *See* 28 U.S.C. § 2283.

[31] Further, under the Court of Appeals' decision in this case, if plaintiffs' federal action reaches judgment first, as appears likely, defendants may *then* remove this action on the basis of the artful pleading doctrine, and seek dismissal on the basis of res judicata. It makes no sense to define the federal nature of claims based entirely upon the respective procedural status of the parallel state and federal actions.

with decisions on the non-preemption branch of the artful pleading doctrine of other federal circuit courts; it is inconsistent with this Court's decision in *Federated Department Stores v. Moitie;* and it conflicts in reason and principle with the numerous decisions of this Court and the lower federal courts establishing that removability may not be determined on the basis of a federal defense. For all of these reasons, the decision should be reviewed and corrected by this Court.

DATED: July 16, 1987

Respectfully submitted,

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July 16, 1987

APPENDIX I
[813 F.2d 1368]

Mary Lou SULLIVAN, Daniel T. Sullivan, William T. Sullivan, Jr., Kenneth C. Martin, Perry Kenny, Calvin F. Robinson, Catherine D. Robinson, Sydney Krogstad, Beverly Krogstad, Joseph S. Wand, Robert G. Mesires, William E. Coyle, Diane H. Coyle, Dan Boyd, Roxana Boyd, Thomas D. Adamson, Mark Adamson, Thomas C. Miller, Brian J. Miller, Robert E. Richardson, Raymond D. Sussman, Anjali Sussman, and Cerena Wong, all individuals; Malm Metal Products, Inc., a California corporation, Malm Metal Products, Inc. Defined Benefit Plan, Pine Creek Development Corporation Pension Plan and Trust, Pine Creek Properties, a California limited partnership, Robert E. Richardson, M.D., P.C., Defined Benefit Pension Plan and Trust, Joseph S. Wand, M.D., Inc., Pension and Profit Sharing Plan and Able Fence Co., Inc., a California corporation, Plaintiffs-Appellants,

v.

FIRST AFFILIATED SECURITIES, INC., a California corporation, Larry Gibson, Harold E. Card, Ronald R. Walker, Carl E. Wright, Wright Herfordt & Sanders, Raymond Jallow, Thomas Tierney, Tierney & Ernst, Ira W. Palmer, William H. Palmer, John P. Redd, Tim D. Compton, Paul J. Keil, Financial Communications Group, Ltd., Peat, Marwick, Mitchell & Co., Process Management Co., Inc. and Does One through Twenty, Doe Corporations Twenty-One through Forty, and Doe Partnerships Forty-One through Sixty, Defendants-Appellees.

No. 85-2961.

**United States Court of Appeals,
Ninth Circuit.**

Argued and Submitted Feb. 11, 1987.

Decided April 1, 1987.

As Amended April 20, 1987.

Two parallel securities actions were filed, one in federal court under federal law, and one in state court under state law.

State claims were removed to federal court. The United States District Court for the Northern District of California, John P. Vukasin, Jr., J., denied remand, based upon its analysis of "artful pleading" doctrine. On plaintiffs' interlocutory appeal, Court of Appeals, Wiggins, Circuit Judge, held that exception where state claims are filed to circumvent res judicata impact of federal judgment did not apply; because investors' claims were framed under state law, were not barred by res judicata nor preempted by federal law, and would only have been within district court's original jurisdiction had they been joined with federal claims, claims should not have been removed.

Denial of motion to remand reversed.

1. Removal of Cases 107(9)

Generally, denial of motion to remand action removed from state to federal court under artful pleading doctrine is question of federal subject matter jurisdiction which Court of Appeals reviews de novo.

2. Removal of Cases 107(7)

Burden of establishing federal subject matter jurisdiction falls on party seeking removal.

3. Removal of Cases 11

Suit may be removed to federal court under original jurisdiction removal statute only if it could have been brought there originally. 28 U.S.C.A. § 1441(a).

4. Removal of Cases 25(1)

Case "arises under" federal law only if federal question appears on face of plaintiff's well-pleaded complaint; original jurisdiction is lacking even if defense is alleged to be based exclusively on federal law so that defendant cannot obtain removal jurisdiction merely by asserting federal defense. 28 U.S.C.A. § 1331.

5. Removal of Cases 25(1)

Plaintiff is "master" to decide what law he will rely upon, and if he can maintain his claim on both state and federal

grounds, he may ignore federal question and assert only state law claim and defeat removal. 28 U.S.C.A. §§ 1331, 1441.

6. Removal of Cases 25(1)

"Artful pleading" doctrine is narrow exception to straightforward rules of removal jurisdiction which will be applied only if particular conduct complained of is governed exclusively by federal law; further, doctrine is invoked only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results.

7. Removal of Cases 25(1)

Traditional example of artful pleading doctrine is one in which defendant had federal preemption defense to state claim and federal law provides remedy, in which case defendant can remove proported state claim; however, if state law is preempted by federal law and federal law provides no remedy, state law claim cannot be recharacterized as federal, as no federal claim exists, preemption is interposed solely as defense, and removal is improper. 28 U.S. C.A. §§ 1331, 1441(a, b).

8. States 18.77

Although federal courts have exclusive jursidiction over claims under 1934 Securities Exchange Act, federal securities laws do not preempt state securities laws that regulate intrastate offerings of securities and affect interstate commerce only incidentally. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

9. Federal Courts 31

Parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction.

10. States 18.1

Res judicata impact of federal judgment is question of federal law which state court is bound to apply under supremacy clause. U.S.C.A. Const. Art. 6, cl. 2.

11. Removal of Cases 102

The "artful pleading" doctrine, as articulated in *Moitie*, was not a basis for denying remand to state court of state law securities action which had been filed shortly before federal action alleging substantially the same facts, as the state law claims were not barred by res judicata or preempted by federal law, and would only have been within district court's original jurisdiction had they been joined with federal claims, which they were not.

Bruce R. MacLeod, San Francisco, Cal., for plaintiffs-appellants.

Michael F. Perlis and Sharon L. O'Grady, San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before SCHROEDER, WIGGINS and THOMPSON, Circuit Judges.

WIGGINS, Circuit Judge:

This is an interlocutory appeal from the district court's order denying plaintiffs' motion to remand plaintiffs' state claims to state court. Plaintiffs filed two parallel securities actions, one in federal court under federal law and one in state court under state law. Defendants removed the state claims to federal court. In its order denying remand, the district court based its decision on its analysis of the "artful pleading" doctrine as articulated in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), and *Salveson* v. *Western States Bankcard Association*, 731 F.2d 1423 (9th Cir.1984). *Moitie* and *Salveson*, however, involved the res judicata effect previously adjudicated federal claims had upon state claims. Because the filing of the federal claims in this case has no res judicata effect upon the state claims, we reverse.

I

The plaintiffs (collectively "Investors") are thirty-four mostly California residents who purchased stock of a Missouri based corporation, Midwestern Companies (Midwestern). Defendants (collectively "FAS-Midwestern") are: First Affiliated Securities, Inc. (FAS), a California stock brokerage firm; Larry Gibson, its broker; and insiders of Midwestern (its former officers, directors, accountants and attorneys).

In February 1985, the Investors filed suit in the California Superior Court for Sonoma County against FAS-Midwestern (the "state action"),[1] alleging, among other claims, fraud, negligent misrepresentation, and breach of fiduciary duty under California common law, and violations of California's "blue sky" securities laws, Cal.Corp. Code §§ 1507(a), 2254, 25401 and 25402. The Investors alleged in part that the Midwestern insiders misrepresented the amount of the company's assets, and that FAS and Gibson misrepresented its income potential.

In March 1985, before serving summons in the state action, the Investors sued FAS-Midwestern in the United States District Court for the Northern District of California (the "federal action"), alleging substantially the same facts and asserting claims under the Securities Exchange Act of 1934 (the "1934 Securities Act"), as amended, 15 U.S.C. §§ 78a et seq., and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

Other Midwestern shareholders brought three federal securities class actions against the Midwestern insiders. The three class actions were consolidated in the United States District Court for the Western District of Missouri. The Investors have opted out of the consolidated class action.[2]

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[1] FAS had earlier sued three of the Investors in the Sonoma County Superior Court to recover amounts allegedly owed for the purchase of Midwestern stock. The three cross-claimed against FAS and Gibson for alleged fraudulent representations in the sale of the stock.

[2] The Investors brought the federal action to avoid duplicative discovery by using discovery from the Missouri litigation in the state action, and to protect against the possibility that the state court would lack personal jurisdiction over the Midwestern insiders. In its order denying remand, the district court questioned whether the Investors could properly maintain the federal action solely to obtain collateral discovery in the state action, but did not sanction them.

In June 1985, FAS-Midwestern removed the state action to the United States District Court for the Northern District of California, then moved to transfer the state and federal actions to the Missouri federal court. The Investors did not contest the transfer of the federal action to Missouri, but moved to remand the state action to the state court for lack of removal jurisdiction. The district court denied the motion to remand, concluding:

> Plaintiffs filed their Federal Action shortly after the filing of their State Action and prior to defendants' removal of the State Action. Further, plaintiffs have evidenced their intention to utilize affirmatively the processes of the federal court to redress the identical claimed injury alleged in their State Action.
>
> In these circumstances, this Court finds that the authorities in this Circuit support defendants' removal of plaintiffs' State Action [citing *Moitie* and *Salveson*]. Plaintiffs' contemporaneous filing of their Federal Action precludes them from defeating removal by the "artful pleading" of the same operative facts as state law claims.

The court denied the Investors' motion for reconsideration of the denial of remand, but certified the remand issue for interlocutory appeal. The Investors timely filed a petition for leave to file an interlocutory appeal, which we granted under 28 U.S.C. § 1292(b).

II

[1,2] Generally, the denial of a motion to remand an action removed from state to federal court under the artful pleading doctrine is a question of federal subject matter jurisdiction which we review de novo. *Bright* v. *Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir.1986). The Supreme Court has suggested, however, that the artful pleading inquiry involves a "factual finding," *Moitie*, 452 U.S. at 397 n. 2, 101 S.Ct. at 2427 n. 2, and in *Salveson* we applied the clearly erroneous standard to the district court's finding of artful

pleading, 731 F.2d at 1429 (citing Fed.R.Civ.P. 52(a)). As the question whether plaintiffs' claims are federal or not would seem to be a legal question, *see Moitie*, 452 U.S. at 409 & n. 5, 101 S.Ct. at 2433 and n. 5 (Brennan, J., dissenting); *Travelers Indem. Co.* v. *Sarkisian*, 794 F.2d 754, 761 n. 9 (2d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), and there are no disputed facts, we review de novo. *See Bright*, 780 F.2d at 768. The burden of establishing jurisdiction falls on the party invoking the removal statute, *Hunter* v. *United Van Lines*, 746 F.2d 635, 639 (9th Cir.1984), *cert. denied*, ___ U.S. ___, 106 S.Ct. 180, 88 L.Ed.2d 150 (1985), which is strictly construed against removal, *Salveson*, 731 F.2d at 1426.

III

[3] The Investors contend that removal is improper because the state action relies solely on state law for relief. A suit may be removed to federal court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. *See Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983). Federal district courts have original federal question jurisdiction of actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.[3]

[4, 5] We begin our analysis with a fundamental tenet of federal jurisdiction—the "well-pleaded complaint" rule. A case "arises under" federal law within the meaning of section 1331 only if a federal question appears on the face of plaintiff's well-pleaded complaint; original jurisdiction is lacking even if a defense is alleged to be based exclusively on federal law. *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); *Hunter*, 746 F.2d at 639. The defendant cannot obtain removal jurisdiction merely by asserting a federal defense. *Hunter*, 746 F.2d at 639. The plaintiff is "master to decide what law he will rely upon," *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913), and, if he can maintain his

[3] As the parties are not of completely diverse citizenship, FAS-Midwestern cannot remove on that ground. 28 U.S.C. § 1441(b).

claim on both state and federal grounds, he may ignore the federal question and assert only a state law claim and defeat removal, *Hunter*, 746 F.2d at 641; 1 A J. Moore & B. Ringle, *Moore's Federal Practice* § 0.160[3.—3], at 231-32 (2d ed. 1986).[4]

[6] However, the plaintiff cannot defeat removal by masking or "artfully pleading" a federal claim as a state claim:

> [O]ccasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. For instance, in many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to federal law in passing on the claim, the case is removable regardless of what is in the pleading.

14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722, at 268-75 (2d ed. 1985) (citations omitted). The "artful pleading" doctrine is a narrow exception to the straightforward rules of removal jurisdiction, which we will apply only if "the particular conduct complained of [is] governed exclusively by federal law." *Hunter*, 746 F.2d at 640. Further, we will invoke the doctrine "only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson*, 731 F.2d at 1427.

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[4] We have questioned the logic of denying removal jurisdiction to a defendant who raises a federal defense. *Hunter*, 746 F.2d at 639. To the extent that the reason for giving federal courts original jurisdiction over federal claims is to assure parties a knowledgable forum for the vindication of federal rights, it makes little sense to permit a defendant to remove only if the plaintiff relies on federal law. *Id.* The American Law Institute has urged Congress to confer removal jurisdiction over cases in which the defendant relies on federal law. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1312 (1969). However, Congress has not seen fit to permit removal unless a plaintiff relies on federal law, and we lack the power to expand our jurisdiction. *Hunter*, 746 F.2d at 639.

[7] A traditional example of the artful pleading doctrine is one in which the defendant has a federal preemption defense to a state claim and federal law provides a remedy. In that case, the defendant can remove the purported state claim. *See Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557, 560, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968) (characterizing state contract claim as claim under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185); *Hunter,* 746 F.2d at 642-43. This is consistent with the rule that jurisdiction cannot be based on a federal defense. *See Hunter,* 746 F.2d at 641-43. If federal law preempts state law and provides a remedy, a plaintiff purporting to plead a state law claim is necessarily relying upon the federal claim, and the federal court to which the action is removed can recharacterize the state claim as a federal one. *Id.* at 642-43. If, however, state law is preempted by federal law and federal law provides no remedy, the state claim cannot be recharacterized as federal, as no federal claim exists, preemption is interposed solely as a defense, and removal is improper. *Id.* at 643.[5]

IV

[8] On the face of the complaint, the Investors have alleged state law claims for fraud and state securities violations. FAS-Midwestern does not contend that federal law preempts these claims. Although the federal courts have exclusive jurisdiction over claims under the 1934 Securities Act, *see Silberkleit* v. *Kantrowitz,* 713 F.2d 433, 436 (9th Cir.1983); 15 U.S.C. § 78aa, federal securities laws do not preempt state securities laws that regulate intrastate offerings of securities and

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[5] Even if federal law provides a remedy, it is unclear why preemption is not simply a defense to a complaint containing only state law claims, rather than a basis of removal. *See Travelers,* 794 F.2d at 758-59 n. 6; 1A J. Moore & B. Ringle, *Moore's Federal Practice* § 0.160[4] (2d ed. 1986); *cf. Illinois* v. *Kerr-McGee Chem. Corp.,* 677 F.2d 571, 577-78 & n. 10 (7th Cir.) (preemption defense held not to permit removal), *cert. denied,* 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982). The state court is as competent to hear the preemption defense as the federal court. While well-established, the doctrinal distinction between preemption with and without a federal remedy appears to rationalize a narrow exception to the rule that removal cannot be obtained by a federal defense.

affect interstate commerce only incidentally, *see North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 582-83 (9th Cir. 1983) (upholding Ariz.Rev.Stat.Ann. § 44-1841); 15 U.S.C. § 77r (states have concurrent jurisdiction to regulate securities). Instead, FAS-Midwestern argues that the Investors have engaged in "artful pleading" by pleading state claims in state court and federal claims in federal court on the same operative facts. We have previously rejected this argument. *In re Sugar Antitrust Litigation, MDL 201*, 588 F.2d 1270, 1272 & n. 5 (9th Cir.1978) (although California filed a federal anti-trust action in federal district court, then filed similar state antitrust action in state court, removal under artful pleading doctrine or other grounds improper), *cert. denied*, 441 U.S. 932, 99 S.Ct. 2052, 60 L.Ed.2d 660 (1979). Were it not for *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), FAS-Midwestern's argument would be groundless.

In *Moitie*, the plaintiffs filed a federal antitrust action in federal district court. The district court dismissed the action because the plaintiffs lacked standing. Rather than appeal, two plaintiffs, Brown and Moitie, relied on the same facts to assert state law claims in a California court. The defendants removed the actions to federal court. The district court relied on the artful pleading doctrine to deny plaintiffs' motion to remand. On the merits, the district court found the state claims barred by the res judicata effect of the prior federal judgment. On appeal, we affirmed removal, but found res judicata inapplicable because of a subsequent change in the law. *Moitie* v. *Federated Dep't Stores, Inc.*, 611 F.2d 1267 (9th Cir.1980). The Supreme Court reversed the res judicata holding and devoted most of its opinion to that issue. The Court approved the removal in a footnote, noting that "at least some of the claims had a sufficient federal character to support removal" under the artful pleading doctrine. *Moitie*, 452 U.S. at 397, n. 2, 101 S.Ct. at 2427 n. 2. The Court remanded for a determination of which claims were barred by res judicata. Justice Brennan dissented primarily because he believed removal jurisdiction was lacking. *Id.* at 404-410, 101 S.Ct. at 2430-2434 (Brennan, J., dissenting).

The Supreme Court did not explain why the state claims had "sufficient federal character to support removal," 452 U.S. at 397 n. 2, 101 S.Ct. at 2427, n. 2, and the task of divining *Moitie's* theoretical underpinnings has fallen to the lower courts and commentators. Preemption could not support removal, for federal antitrust law has not been held to preempt state laws. *See Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 130, 98 S.Ct. 2207, 2216, 57 L.Ed.2d 91 (1978); C. Wright, *The Law of Federal Courts* § 38, at 217 (1985). Two justifications may be advanced for *Moitie*'s use of the artful pleading doctrine: (1) plaintiff's election of forums by suing in federal court, and (2) federal res judicata. For the following reasons, we reject the election explanation, and instead adopt that of res judicata.

A. ***Election of Forums***

In *Salveson,* we were confronted with facts parallel to *Moitie.* The district court had dismissed a federal antitrust suit. Plaintiffs then filed state claims based on the same facts. We affirmed the district court's denial of plaintiffs' motion to remand on the authority of *Moitie* and affirmed dismissal of the action as res judicata. 731 F.2d at 1429-30.

In *Salveson,* we suggested *Moitie* allowed removal because the plaintiffs consented to federal forum. We said that the plaintiffs, by proceeding in federal court with federal claims, could not be permitted to recast the same claims as state claims to the prejudice of the defendants. *Id.* at 1429. We noted in dictum[6] that *Moitie* permits removal if the plaintiff " 'by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one.' " *Id.* (quoting *Salveson* v. *Western States Bankcard Ass'n,* 525 F.Supp. 566, 577 (N.D.Cal.1981), *aff'd in part and rev'd in part,* 731 F.2d 1423 (9th Cir.1984). *Accord Travelers Indem. Co.* v. *Sarkisian,* 794 F.2d 754, 760-761 (2d Cir.) (having elected to proceed in federal court and "having foregone the opportunity to plead a pendent state claim, [the

[6] We stated that an alternative ground for removal in *Moitie* was the res judicata effect of the federal judgment. *Salveson,* 731 F.2d at 1427, 1429 (*see infra* section IVB).

plaintiff is] not free to abuse the dual court system by filing in state court a second lawsuit and resubmitting his claim as one based solely on state law"), *cert. denied*, ___ U.S. ___, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986); *Reid* v. *Walsh*, 620 F.Supp. 930 (M.D.La.1985) (state securities action properly removed to federal court because plaintiffs filed federal securities action on the same general facts).

Adoption of this consent rationale would put a plaintiff who could file both state and federal claims to an election of forums and remedies. To maintain his state claim in state court without risking removal, he could not assert his federal claim either in federal or state court. If he filed the federal claim with the state claim in state court, the defendant could remove the state claim based on pendent jurisdiction. *Bale* v. *General Tel. Co.*, 795 F.2d 775, 778 (9th Cir.1986). If he filed a separate federal action, the defendant could still remove the state claim based on the election to proceed in federal court.

Requiring plaintiffs to submit to this election would avoid splitting of claims arising from the same facts, simplify mass litigation, save judicial resources, and balance the plaintiffs' choice of forum against the defendants' interest in avoiding multiple litigation. For example, holding the Investors to their election would lead to consolidation of the state action with the Missouri litigation.

[9] However, the election rationale has serious flaws. First, the Supreme Court in *Moitie* did not articulate the election theory, and that approach had never been accepted as justifying removal before *Moitie*. *See Sugar Antitrust Litigation*, 588 F.2d at 1272; C. Wright, *The Law of Federal Courts* § 38, at 217 (1985). It is the traditional rule that the parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction. *See Knaefler* v. *Mack*, 680 F.2d 671, 676 n. 5 (9th Cir. 1982); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3522, at 66-67 (2d ed. 1984). Yet the election approach would confer removal jurisdiction over state

claims based on the plaintiffs' waiver of lack of jurisdiction by consent to the federal forum.[7]

Second, the election approach is inconsistent with the removal statute. A suit may be removed from state court if it arises under federal law. 28 U.S.C. §§ 1331, 1441(a). FAS-Midwestern does not argue that the Investors' state claims are actually federal claims, nor that there is a federal defense to the state claims. Federal law is only interjected because the claims would have been pendent claims had they been filed in the same complaint with federal claims. *See Blake* v. *Pallan*, 554 F.2d 947, 956-57 n. 11 (9th Cir. 1977). As the state and federal claims were filed separately, the state claims are not pendent, nor within original federal jurisdiction, and do not arise under federal law.

Third, the election justification does not conform to traditional notions of removal under the artful pleading doctrine. The doctrine permits courts to recharacterize state claims as federal claims if the plaintiff has attempted to defeat removal by omitting to plead necessary federal questions. *Franchise Tax*, 463 U.S. at 22, 103 S.Ct. at 2852. The Investors have not failed to plead necessary federal law. Although their state claims are based on the same operative facts as their federal claims, the state claims are created and governed by state law, and in the absence of preemption cannot be characterized as federal claims. *Sugar Antitrust Litigation*, 588 F.2d at 1272 n. 5. Because the Investors' claims are not preempted, there is no basis to recharacterize their claims as federal claims.

Fourth, acceptance of the election theory would expand removal jurisdiction to a significant number of state cases in which the plaintiff has filed a parallel federal case, contrary to principles of federalism. "So long as States retain authority to

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[7] Justice Blackmun, joined by Justice Marshall, concurred in *Moitie*, suggesting a much narrower consent rationale for removal; by failing to cross-petition from the Ninth Circuit's judgment that the state claims were merely disguised federal claims, the argument that the case should be remanded to state court should be barred by res judicata. 452 U.S. at 404, 101 S.Ct. at 2430 (Blackmun, J., concurring). *Accord Vitarroz Corp.* v. *Borden, Inc.*, 644 F.2d 960, 964-65 (2d Cir.1981) (by failing to move to remand to state court, plaintiff accepted defendant's characterization of its state claim as one based on federal law).

legislate in subject areas which Congress had legislated without preempting the field, and so long as state courts remain the preferred forum for interpretation and enforcement of state law, plaintiffs must be permitted to proceed in state court under state law." *Moitie*, 452 U.S. at 407, 101 S.Ct. at 2432 (Brennan, J., dissenting); *accord Sugar Antitrust Litigation*, 588 F.2d at 1273 (in the absence of preemption, "the state should be free" to construe its laws); *see United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless [federal] decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law").

Fifth, attempts to place limits on the scope of the election rationale have been unsatisfactory. The Second Circuit allows removal based on a plaintiff's election only if he filed substantially similar state and federal claims, and filed the federal claim in federal court first. *Travelers*, 794 F.2d at 760-61 (denying removal because state claim not substantially similar). The requirement of substantial similarity of claims seems unsound. A state claim that shares elements of a federal claim no more arises out of federal law than any claim would that arose out of the same operative facts as the federal claim. Also, the order of filing should make no difference. Regardless of the filing order, the plaintiff will have elected to use the federal forum and to split his claims.

In *Powers* v. *South Central United Food & Commercial Workers Union* [sic], 719 F.2d 760, 766 & n. 5 (5th Cir.1983), the plaintiff filed parallel state and federal actions. The Fifth Circuit held that removal was improper because, in contrast to *Moitie*, the plaintiff had "not evidenced a desire to proceed under federal law; rather, she has consistently and vociferously attempted to avail herself of the state forum," *id.* at 766, and she filed the federal suit after the state suit as a tactical maneuver to protect against the running of the statute of limitations, *id.* at 766 n. 5. The Fifth Circuit's distinctions are not persuasive. The amount of effort plaintiff expended in the state forum, and her motives for filing the federal action,

whether tactical or not, are irrelevant if removal is justified by the election to pursue the federal action.

B. *Res Judicata*

A less expansive explanation for *Moitie's* use of the artful pleading doctrine is that *Moitie* permits removal only if a federal res judicata defense is present. In *Salveson* we suggested *Moitie* was so limited. We said that in both *Moitie* and *Salveson* the plaintiffs had first filed federal claims in federal court and lost, and then attempted to recharacterize those same claims in state court. 731 F.2d at 1429. We said that the state claim "was really the same [federal] claim in disguise against which summary judgment had already been entered, and . . . was barred by res judicata." *Id.* at 1427.

Moitie found removal justified because of the "federal character" of the state claims. 452 U.S. at 397 n. 2, 101 S.Ct. at 2427 n. 2. Considering federal res judicata principles as the source of that "federal character" has support in the *Moitie* opinion. The Supreme Court dedicated most of its opinion to res judicata, giving cursory treatment to removal. *Moitie* can thus be construed as permitting removal only of state claims filed to circumvent the res judicata impact of a federal judgment. *See Hunter,* 746 F.2d at 641-42 (citing *Salveson* for the proposition that *Moitie* permits removal in the res judicata context); *Magic Chef, Inc.* v. *International Molders & Allied Workers Union,* 581 F.Supp. 772, 776 n. 4 (E.D.Tenn.1983); *Gold* v. *Blinder, Robinson & Co.,* 580 F.Supp. 50, 53 n. 1 (S.D.N.Y.1984) (*Moitie* is "an aberration, necessary in light of the unusual facts of that case"); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722, at 305-06 n. 108 (2d ed. 1985).

[10] This rationale has been criticized. The res judicata impact of a federal judgment is a question of federal law which a state court is bound to apply under the Supremacy Clause. *See Limbach* v. *Hooven & Allison Co.,* 466 U.S. 353, 361-62, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984). The state court is competent to apply federal res judicata in the state lawsuit, and res judicata would be interposed as a defense which ordinarily would not support removal. *See Travelers,* 794 F.2d at 761 nn.

8 & 10; C. Wright, *The Law of Federal Courts* § 38, at 217 (1985). But as in the case of federal preemption coupled with a federal remedy, we can recharacterize a state claim barred by the res judicata effect of a federal judgment as an artfully pleaded federal claim. The federal judgment would ordinarily preclude the plaintiff from relitigating any federal or state claim arising out of the same operative facts. A purported state claim based on those facts would be in effect the same federal claim against which the judgment had been entered. *See Salveson*, 731 F.2d at 1427. The removing court could thus recharacterize the state claim as an artfully pleaded federal claim filed to circumvent the res judicata effect of the federal judgment. *See, e.g., id.*

Further, the courts have already developed an exception to the rule that a federal defense cannot support removal in the preemption context—along with an elaborate explanation of why preemption is not merely a defense but also a means of recharacterizing a state claim as federal (see supra n. 5)—and this interpretation of *Moitie* only creates another narrow exception in the res judicata context.

[11] Construing *Moitie* as limited to the removal of state claims precluded by a federal judgment is consistent with the removal statute. Because of the presence of federal res judicata, the state claims in *Moitie* had a substantial federal component, and so arguably arose from federal law. Adopting the res judicata rationale also squares our decisions in *Salveson*, permitting removal in the res judicata context, with *Sugar Antitrust Litigation*, denying removal in the context of parallel state and federal litigation, and comports with our policy of invoking the artful pleading doctrine "only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson*, 731 F.2d at 1427. We therefore construe *Moitie* as limited to removal of state claims precluded by the res judicata effect of a federal judgment. Because the Investors' claims are framed under the state law, are not barred by res judicata nor preempted by federal law, and would only have been within the district court's original jurisdiction had they been joined with federal claims, which

they were not, we reverse the district court's denial of plaintiffs' motion to remand the state action to state court.[8]

V

Removal of the Investors' state action might promote judicial economy. However, while "complex state and federal actions proceeding simultaneously against the same parties [may] pose grave problems in the management of litigation," *Sugar Antitrust Litigation*, 588 F.2d at 1273, we are not free "to implement policies, such as coordination with pending multidistrict litigation, which, though desirable, lie beyond the scope of the removal statute." *Salveson*, 525 F.Supp. at 575.

Other means are available to courts to coordinate duplicative state and federal litigation. The federal courts can in limited, appropriate cases stay federal actions because of pending state actions. *See, e.g., Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *Tovar* v. *Billmeyer*, 609 F.2d 1291, 1293 (9th Cir.1979). The California courts also have the power to stay state litigation pending resolution of parallel federal litigation. *See Thomson* v. *Continental Ins. Co.*, 66 Cal.2d 738, 747,

[8] FAS-Midwestern offers two alternative grounds for removal: pendent jurisdiction and waiver. It argues that the district court can remove the state claims because they arise out of the same operative facts as the federal claims and would be within the district court's original pendent jurisdiction if filed with the federal claims. It relies on *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). *Gibbs* does not support this proposition. *Gibbs* held that the federal courts have the power to hear state claims which the plaintiff has *chosen* to file in the same complaint with federal claims. It is implicit in this holding that the plaintiff can choose to file parallel state and federal actions. *Gibbs* acknowledged that the state forum is often the better one to hear state claims. *Id.* at 726. FAS-Midwestern cites no authority for its proposed extension of the doctrine of pendent jurisdiction to state claims that are not appended at all to federal claims, but rather filed in a separate lawsuit.

FAS-Midwestern also argues that the Investors are estopped from asserting or have waived their right to remand to the state court because they are using their federal action improperly to gain a discovery advantage in state court, and have unfairly split their cause of action. The plaintiff cannot confer removal jurisdiction by waiver or estoppel. *Knaefler*, 680 F.2d at 676 n. 5.

59 Cal.Rptr. 101, 427 P.2d 765 (1967); 2 B. Witkin, *California Procedure, Jurisdiction* § 349 (3d ed. 1985). The state court would later determine if the federal judgment were res judicata on the state litigation. *See* 2 B. Witkin, *supra*, § 348. While the power of federal courts to enjoin state proceedings is limited, *see* 28 U.S.C. § 2283, FAS-Midwestern could also consider moving in federal court to enjoin the state action. *Sugar Antitrust Litigation*, 588 F.2d at 1273-74 n. 7. By means of stays, injunctions, and the doctrine of res judicata, federal and state courts can coordinate parallel state and federal litigation without manipulating the removal statute to promote policies beyond its scope.

The district court's order denying the Investors' motion to remand is REVERSED. The case is REMANDED to the district court to remand the state action to state court.

APPENDIX II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY LOU SULLIVAN, et al., *Plaintiffs,* v. FIRST AFFILIATED SECURITIES, INC., et al., *Defendants.*	**No. C-85-3850-JPV** **ORDER DENYING PLAINTIFFS' MOTION TO REMAND AND GRANTING DEFENDANTS' MOTIONS TO TRANSFER VENUE OF RELATED ACTIONS**

On August 1, 1985, there came on regularly for hearing the following motions: plaintiffs' motion to remand, pursuant to 28 U.S.C. § 1447(c), Case No. C 85 3850 JPV to the Superior Court of the State of California for the County of Sonoma; the motion by all defendants to transfer both of the above-captioned actions, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Western District of Missouri; and the requests of certain defendants for sanctions against plaintiffs and/or plaintiffs' counsel.

Having considered the memoranda filed by the parties relating to these motions, the evidence submitted in support thereof, the pleadings to which these motions relate, and the arguments of counsel, the Court finds as follows:

1. Case No. C 85 3850 JPV, originally filed by plaintiffs' [sic] in Sonoma County Superior Court (the "State Action"), was properly removed to this Court by defendants.

a. Plaintiffs filed their State Action on February 7, 1985. Shortly thereafter, on March 4, 1985, the same plaintiffs filed their action against the same defendants in this Court, Case No. C 85 2151 JPV (the "Federal Action").

b. Plaintiffs' complaints in their State Action and their Federal Action involve the same parties, contain virtually identical factual allegations, and seek redress for the same alleged wrong.

c. On June 14, 1985, defendants timely removed plaintiffs' State Action to this Court. All defendants who received plaintiffs' complaint in the State Action either joined in the Petition For Removal, filed June 14, 1985, or timely joined thereafter.

d. Plaintiffs' objections to removal on the grounds that defendant Ronald Walker never joined the removal are overruled. Plaintiffs failed to rebut the evidence presented by defendants that defendant Ronald Walker never received a copy of the Complaint in the State Action and therefore was not required, under 28 U.S.C. § 1446(a), to join in the removal.

e. Plaintiffs filed their Federal Action shortly after the filing of their State Action and prior to defendants' removal of the State Action. Further, plaintiffs have evidenced their intention to utilize affirmatively the processes of the federal courts to redress the identical claimed injury alleged in their State Action.

f. In these circumstances, this Court finds that the authorities in this Circuit support defendants' removal of plaintiffs' State Action. *Salveson* v. *Western States Bankcard Ass'n.*, 525 F.Supp. 566 (N.D. Cal. 1981), *aff'd. in relevant part*, 731 F.2d 1243 [*sic*] (9th Cir. 1984); *see also Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980), *rev'd. on other grounds*, 452 U.S. 394

(1981). Plaintiffs' contemporaneous filing of their Federal Action precludes them from defeating removal by the "artful pleading" of the same operative facts as state law claims.

g. The case of *Powers* v. *South Central Union Food & Commecial* [*sic*] *Workers' Union* [*sic*], 719 F.2d 760 (5th Cir. 1983), principally relied upon by plaintiffs in support of their remand motion, is distinguishable from the instant case in two important respects: (i) the plaintiff there filed her federal action after defendants had removed the state court action to federal court and (ii) the plaintiff there filed her federal action as a purely defensive tactic to protect against the expiry of the applicable statute of limitations in the event she was forced to proceed in federal court. *Id.* at 766 n.5. In contrast, plaintiffs here filed their Federal Action prior to defendants' removal of their State Action and plaintiffs have acknowledged their desire affirmatively to invoke the jurisdiction of the federal courts and to utilize its processes. This Court therefore finds that removal of the State Action is proper under the principles articulated in *Salveson* and *Moitie*.

h. This Court has jurisdiction over plaintiffs' Federal Action founded on claims arising under the laws of the United States.

i. The claims asserted in Plaintiffs' State Action and the federal claims asserted in their Federal Action derive from a common nucleus of operative fact, pleaded virtually identically in the two actions.

j. The claims asserted in Plaintiffs' State Action and in their Federal Action are such that plaintiffs would ordinarily be expected to try them in one judicial proceeding, because, according to Plaintiffs' complaints, the facts to be tried in each action are the same.

k. The State Action is a civil action over which this Court has original pendent jurisdiction founded on claims arising under federal law alleged in the Federal Action.

2. Venue over both plaintiffs' related actions more appropriately lies in the Western District of Missouri:

a. There are already pending in that district the following actions relating to The Midwestern Companies: (i) a consolidated securities action, containing class allegations, and including virtually all of the defendants in these actions; (ii) an action by the directors [sic] and officers [sic] liability insurer against the officer and director defendants, including certain of the defendants in these actions; and (iii) the Chapter 11 bankruptcy cases filed in that district by The Midwestern Companies and its subsidiary, Titan.

b. The events giving rise to the majority of plaintiffs' claims in these actions occurred in that district.

c. The majority of defendants in these actions reside in or near that district.

d. The majority of non-party witnesses whose testimony will be relevant to these actions reside in or near that district.

e. The majority of the documentary evidence relevant to these actions is located in that district. The documentary evidence in the possession of The Midwestern Companies is subject to orders of the Bankruptcy Court in that district.

f. There is no statutory authority for plaintiffs' request for a transfer to that district for the limited purpose of pretrial discovery only. In all events, such a limited transfer will only serve to place an additional burden on judicial resources and will not serve the interests of justice.

3. Although this Court questions plaintiffs' actions in filing their Federal Action for the reasons stated by them, and is confronted by a close question in considering defendants' requests for sanctions, this Court does not find that plaintiffs' conduct was motivated by bad faith or was so egregious so as to warrant imposition of sanctions.

In view of the above findings, and good cause appearing,

IT IS HEREBY ORDERED that plaintiffs' motion to remand Case No. C 85 3850 JPV be and hereby is denied.

IT IS FURTHER ORDERED that defendants' motions to transfer Case Nos. C 85 2151 JPV and C 85 3850 JPV to the Western District of Missouri be and hereby are granted.

IT IS FURTHER ORDERED that the Clerk of this Court is directed to prepare the docket in both actions and transfer forthwith Case Nos. C 85 2151 JPV and C 85 3850 JPV to the United States District Court for the Western District of Missouri.

IT IS FURTHER ORDERED that the requests of certain defendants for sanctions against plaintiffs and/or plaintiffs' counsel be and hereby are denied.

DATED: Aug 26, 1985

JOHN P. VUKASIN, JR.

United States District Judge

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY LOU SULLIVAN, et al, *Plaintiffs-Appellants,* v. FIRST AFFILIATED SECURITIES, INC., et al, *Defendants-Appellees.*	No. 85-2961 D.C. No. C 85-3850-JPV ORDER

Before: SCHROEDER, WIGGINS AND THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX IV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY LOU SULLIVAN, et al.,

Plaintiffs,

v.

FIRST AFFILIATED SECURITIES, INC. et al.,

Defendants.

No. C-85-3850 JPV
ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND CERTIFYING DENIAL OF PLAINTIFFS' MOTION TO REMAND FOR INTERLOCUTORY APPEAL

The Court having ordered plaintiffs' motion for reconsideration of its August 26, 1985, Order Denying Plaintiffs' Motion to Remand and Granting Defendants' Motions to Transfer Venue of Related Actions submitted on the pleadings, and having fully considered the briefs in support and opposition thereto, the Court is of the opinion that plaintiffs have failed to adduce new material sufficient to warrant reconsideration of the aforesaid Order. Accordingly, plaintiffs' motion for reconsideration is DENIED.

However, the Court further believes that plaintiffs have demonstrated good cause for certification of the issues presented by the motion to remand for immediate appeal pursuant to 28 U.S.C. § 1292(b). The issue of whether removal is proper in the precise circumstances presented by this case is apparently one of first impression and, accordingly, involves a controlling

question of law as to which there is substantial ground for difference of opinion. The Court is of the further opinion that an immediate determination of these questions on appeal may materially advance the ultimate determination of this litigation in that, if the removal here is found to have been improvident, the parties will have been spared the time and expense of litigation of this matter in the United States District Court for the Western District of Missouri, only to face relitigation of the same matters should the Court's ruling on the motion to remand prove to have been incorrect.

Accordingly, IT IS HEREBY ORDERED:

(1) That plaintiffs' motion for reconsideration of this Court's prior Order denying their motion to remand in case number C-85-3850 JPV is DENIED;

(2) That plaintiff's motion for certification of those portions of the Order denying the motion to remand is GRANTED, and that the Order, as it relates to case number C-85-3850 JPV, is CERTIFIED for interlocutory appeal pursuant to 28 U.S.C. § 1292(b); and

(3) That in all other respects this Court's Order of August 26, 1985, stands.

Dated: SEP 17, 1985

J. P. VUKASIN, JR.

J. P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT COURT

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY LOU SULLIVAN, et al.,
Plaintiffs-Appellants,

vs.

FIRST AFFILIATED SECURITIES INC., et al.,
Defendants-Appellees.

No. 85-2961
DC CV 85-2850 JPV

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41 (b) Fed.R.App.P.)

Upon due consideration of appellees' motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before July 17, 1987,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby STAYED.*

CHARLES E. WIGGINS

Charles E. Wiggins
United States Circuit Judge

* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.